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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY RAMON LOPEZ, JR.,

Defendant and Appellant.

E038791

(Super.Ct.Nos. RIF110135
& RIF118365)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan,
Judge. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzales, Supervising
Deputy Attorney General, and Garrett Beaumont, Deputy Attorney General, for Plaintiff
and Respondent.

Defendant and appellant Johnny Ramon Lopez, Jr. contends that the trial court abused its discretion when it sentenced him to state prison instead of reinstating his probation. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2003, the police served a search warrant at a house in Home Gardens, California. Defendant was at the house and consented to a pat-down search. The police found .23 grams of methamphetamine in a baggie in defendant's pocket.

On May 19, 2003, defendant pled guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (case No. RIF110135) and was granted drug diversion for 18 months, pursuant to Penal Code section 1000.¹ Defendant repeatedly failed to report to the program, causing the court to revoke and reinstate the program several times.

On July 30, 2004, police officers observed defendant riding a bicycle with beer in the bicycle rack. When the officers attempted to contact him, defendant jumped off the bicycle and fled. The police apprehended him and found a baggie with .2 grams of methamphetamine and a pipe in his pocket.

On August 3, 2004, defendant pled guilty to transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)) and resisting an officer (§ 148, subd. (a)(1)), (case No. RIF118365). The court granted defendant formal probation for 36 months.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

On August 16, 2004, the court found defendant in violation of probation in case No. RIF110135 for failure to report to his probation officer and failure to report to the California Recovery Clinics as ordered. The court terminated diversion and placed defendant on probation in that case as well. One of defendant's probation conditions required him to be in jail custody on weekends. Defendant subsequently failed to appear for his weekend custody several times.

On June 9, 2005, a petition alleging that defendant violated probation in case Nos. RIF110135 and RIF118365 was filed. (§ 1203.2, subd. (b).) The petition charged defendant with felony vandalism (§ 594, subd. (b)(1)), making a criminal threat (§ 422), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and possession of narcotics paraphernalia. (Health & Saf. Code, § 11364.)

Then, on June 17, 2005, another petition alleging that defendant violated probation in case No. RIF118365 was filed. (§ 1203.2, subd. (b).) The petition charged defendant with being under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (a).)

On June 22, 2005, the court found defendant to be in violation of his probation in both cases. On July 27, 2005, the court sentenced defendant to state prison for the low term of two years for case No. RIF118365. The court also sentenced defendant to state prison for two years in case No. RIF110135, to run concurrent with the two-year term in case No. RIF118365.

ANALYSIS

The Trial Court Properly Revoked Defendant's Probation and Sentenced Him to State

Prison

Defendant argues that the trial court abused its discretion when it sentenced him to state prison instead of reinstating his probation. We disagree.

“[A] sentencing court has broad discretion to grant or deny probation except when otherwise limited by statute, and a decision denying probation will be reversed only upon a clear showing that the court exercised its discretion in an arbitrary or capricious manner. [Citation.]” (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.)

Here, the trial court properly exercised its discretion in sentencing defendant to prison, instead of reinstating his probation, since he repeatedly failed to report to the drug diversion program, repeatedly committed new crimes while on probation, and failed to report to the jail to serve custody on weekends. Furthermore, defendant continued to use drugs heavily while on probation.

Defendant claims that the court abused its discretion in not reinstating his probation, since the probation officer knew of defendant's past shortcomings, yet still recommended reinstatement. While the court considered the probation officer's report, which stated that defendant's main problem was substance abuse and opined that defendant would benefit from a residential treatment program, the court simply decided not to follow the recommendation. “‘The primary function served by the probation report required by section 1203 *is to assist the court* in determining an appropriate disposition after conviction.’ [Citation] In the final analysis that determination is a matter of

judgment for the court, not the probation officer. [Citation.]” (*People v. Warner* (1978) 20 Cal.3d 678, 683, italics in original; superseded by statute on other grounds as stated in *People v. Bailey* (1996) 45 Cal.App.4th 926, 930.) In other words, the court ““may reject *in toto* the report and recommendation of the probation officer.’ [Citations.]” (*People v. Warner, supra*, 20 Cal.3d 678 at p. 683, italics in original.)

In sum, the court did not abuse its discretion by rejecting the probation officer’s recommendation to reinstate defendant’s probation. The court considered the circumstances and properly exercised its discretion in sentencing defendant to prison.

DISPOSITION

The judgment is affirmed.

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/s/ Hollenhorst
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.